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May 14, 2007

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: RM-11358: Petitions for Rulemaking and Clarification Regarding
the Commission's Rules Applicable to Incumbent LEC Retirement
of Copper Loops and Copper Subloops

Dear Ms. Dortch:

Please find attached for filing with the Commission in the above-referenced proceeding the letter of the Office of Advocacy of the U.S. Small Business Administration, regarding the impact of incumbent LEC retirements of copper facilities on small businesses.¹ This letter inadvertently was omitted from *ex parte* submission of Covad Communications Group, Inc., NuVox Communications and XO Communications, LLC, dated May 10, 2007, and should be included in the record for the above-referenced proceeding.

Please feel free to contact the undersigned counsel at (202) 342-8625 if you have any questions, or require further information.

¹ Letter from Thomas M. Sullivan, Chief Counsel for Advocacy and Cheryl M. Johns, Assistant Chief Counsel for Telecommunications, Office of Advocacy, U.S. Small Business Administration to Chairman Kevin J. Martin, Federal Communications Commission (May 10, 2007).

KELLEY DRYE & WARREN LLP

Ms. Marlene Dortch, Secretary
May 14, 2007
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Respectfully submitted,


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Advocacy: the voice of small business in government

May 10, 2007

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8- B20
Washington, DC 20554

Dear Chairman Martin:

As part of its statutory duty to monitor and report on the Federal Communications Commission's ("FCC's" or "Commission's") compliance with the Regulatory Flexibility Act (RFA),¹ the Office of Advocacy ("Advocacy") of the U.S. Small Business Administration has reviewed the Commission's action on the Network Change Certifications (also referred to by small businesses as "copper retirement petitions"). While Advocacy commends the Commission's dedication to the President's Broadband Policy Initiative, we believe the heightened pace of copper retirement warrants further economic analysis. Such an analysis may show that allowing companies to continue to develop and utilize the copper network will further the Administration's broadband policy goals. Advocacy believes that the FCC should conduct a rulemaking on this issue and undertake the appropriate economic analysis. This would give small businesses the opportunity to comment on copper retirement and put forward meaningful alternatives. A rulemaking would provide small businesses with a visible avenue in which their voice can be heard on this issue. Moreover, opening the copper retirement issue for notice and comment will foster transparency, and enable the Commission to make a better informed set of decisions.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory Flexibility Act ("RFA") requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.²

Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.³ To this end, the RFA requires agencies to analyze the economic impact of regulatory actions when there is likely to be a significant economic impact on a substantial

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.⁴

Immediate Copper Retirement Will Have a Significant Economic Impact on a Substantial Number of Small Businesses and Should be Open for Comment.

Small businesses have notified our office that incumbent local exchange carriers (ILECs) have filed a series of petitions with the Federal Communications Commission (FCC) requesting permission to "retire" portions of the copper network still connecting the majority of consumers and businesses. Advocacy understands that the Commission has accepted these petitions on a rolling basis, without providing the public with the benefit of a notice and comment period; and the number of petitions filed has dramatically increased over the past year.⁵ If granted, this accelerated regulatory movement may inhibit small business participation in the market for telecommunications services.

Many small carriers rely exclusively on copper to conduct their business, and the FCC's Part 51 rules fail to consider the potential negative impact of unilateral network modifications on small businesses.⁶ The rulemakings from which these rules were promulgated never considered the economic impact of the final language, and failed to offer any meaningful alternatives. In addition, the current FCC rules allow the ILECs to deny small businesses access to the fiber networks now being deployed. This could force competitive local exchange carriers, many of which are small businesses, out of the market.

Because the copper retirement process will have this significant economic impact on small businesses, Advocacy recommends that the Commission open a rulemaking to better examine the effect of copper retirement on the U.S. telecommunications market.

Small Businesses Play an Important Role in the U.S. Telecommunications Market.

An Advocacy-sponsored study has shown that small firm contribution to innovation is the most intense in new and emerging technologies.⁷ In the U.S. telecommunications sector, small businesses have become increasingly dynamic by developing new technologies based on the legacy copper network. Small telecommunications providers have been able to offer competitive packages⁸ to consumers, rivaling the cable platforms offered in their regions. These and similar

⁴ See generally, Office of Advocacy, U.S. Small Business Administration, A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act (2003), available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

⁵ According to the FCC's website, in February 2007, Verizon posted 83 copper retirement notices, compared to a single notification filed in for the entire second half of 2006.
http://www.fcc.gov/wcb/cpd/other_adjud/Archive/network.html.

⁶ 47 C.F.R. § 51. Under Section 51, small businesses lack any means by which they can object to an incumbent local exchange carrier's (ILEC's) termination of service. The rules merely require ILECs to state their intent to retire a copper loop.

⁷ CHI Research, Inc., Small Serial Innovators: The Small Firm Contribution to Technical Change 3 (2003).

⁸ For example, ADSL2+ extends the capabilities of ADSL by increasing the number of downstream bits and the frequency band of traditional ADSL. Independent telephone companies and rural carriers currently have the highest number of ADSL2+ subscribers in the United States, and they are using this technology to offer customers triple-play packages.

offerings have created a wide range of telecom choices for small business customers.⁹ The retirement of copper will eliminate these technologies, and any new copper-based technologies currently under development. Small business consumers of telecom services fear that their telecom services will become more expensive.¹⁰

There May Be Alternatives to Copper Retirement.

The copper retirement process could dramatically change the competitive landscape of U.S. telecommunications. Small competitive local exchange carriers (CLECs) have contacted Advocacy and explained how the removal of copper will unduly burden their business, as well as the small businesses that they service. Therefore, Advocacy recommends that the FCC examine the plausible alternatives that have been put forth by small businesses. In addition to the overall economic impact on small businesses, there are a host of related issues that should also be addressed as copper is removed, including:

- How will immediate copper retirement impact the competitiveness of the U.S. telecommunications market and unnecessarily burden small businesses?
- What increases in costs will be involved for small business customers that currently receive service over copper?
- What emerging businesses are developing new ways to utilize copper to deploy advanced telecommunications and broadband services in the U.S. market?
- What safeguards will exist for small businesses in the wake of a disaster such as 911 or Katrina if the new network fails, given there is no back-up system?
- Could the existing copper be auctioned, leased or otherwise utilized to avoid undue waste?

⁹ See Sean Buckley, *There's Still Gold in That Copper: DSL: The Ever Evolving Pipe*, Telecommunications Magazine (January 4, 2007), Telecommunications Magazine, available at: http://www.telecommagazine.com/NewsGlobe/article.asp?ID=AR_2661.

¹⁰ Kelly M. Teal, *Out of the Loop* (4/30/2007), Phoneplusmag.COM available at: <http://www.phoneplusmag.com/articles/829/74h271571654752.html>.

Summary

Advocacy requests that the FCC open a rulemaking to provide small businesses with the opportunity to comment on how these changes will impact their structure, and to examine possible alternatives to the immediate retirement of copper. Advocacy recommends that the Commission address the above-mentioned issues, and receive further input from small businesses to address their concerns. The economic landscape of telecommunications is changing rapidly. The FCC would benefit from more transparent analysis and comments from small business, both of which can be facilitated by a rulemaking on copper retirement. Advocacy pledges to assist the FCC in initiating such a rulemaking and engaging the business community throughout the process.

Respectfully Submitted,

/s/ _____
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
Cheryl M. Johns
Assistant Chief Counsel for Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 Third Street, S.W.
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Washington, D.C. 20416

May 10, 2007

cc:

Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Susan Dudley, Administrator, Office of Information and Regulatory Affairs

Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this May 10, 2007, caused to be mailed, first-class, postage prepaid, a copy of the foregoing letter to the following:

/s/ _____
Cheryl M. Johns

Honorable Kevin J. Martin
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